IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 15, 2009 Session

DAVID ALAN THOMPSON, SR. v. WENDY JANETTE THOMPSON

Appeal from the Chancery Court for Hamilton County
No. 98-0915 W. Frank Brown, III, Chancellor

No. E2009-00149-COA-R3-CV - FILED OCTOBER 27, 2009

In this post-divorce action, issues regarding child support were litigated after the Trial Court modified custody. After the trial, the Trial Court *sua sponte* contacted David Alan Thompson's ("Father") employer and obtained information regarding Father's wages and benefits. The Trial Court entered its order finding and holding, *inter alia*, that Father was entitled to a judgment against Wendy Janette Thompson ("Mother") for $6,275.13 plus interest for overpayment of child support. Mother appeals to this Court raising issues regarding the *sua sponte* investigation and the calculation of child support. We hold that the *sua sponte* investigation did not comply with Tenn. R. Evid. 614. We, therefore, vacate the Trial Court's judgment and remand this case to the Trial Court to receive additional proof, or not, as the Trial Court deems necessary, and then decide all issues based solely upon the evidence as presented by the parties to, and received by, the Trial Court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Ronald J. Berke and Megan England Demastus, Chattanooga, Tennessee for the Appellant, Wendy Janette Thompson.

David Alan Thompson, Sr., Chattanooga, Tennessee, Pro Se Appellee.

OPINION

Background

Father and Mother were divorced in 1999. In August of 2006, Mother filed a Petition for Contempt alleging that Father was in contempt for failing to supply Mother with information about his income as required in the parties' Final Decree. Father answered and filed a counter-claim alleging, in part, that Mother had failed to follow the parties' Parenting Plan. Father also alleged a material change of circumstances and requested a revised parenting plan. The Trial Court held a hearing and then entered an order on October 11, 2007, finding and holding, *inter alia*, that custody would be modified such that Father would be designated as the primary residential parent of the parties' daughter with Mother to remain as the primary residential parent of the parties' son, that "the attorneys shall determine the child support calculations (a) for the time both children were in [Mother's] custody and (b) afterwards when [the parties' daughter] went to live with [Father]…," and that the attorneys either would resolve the remaining financial issues or obtain a trial date.

After entry of the October 11, 2007 order, Father's attorney moved to withdraw from the case and was granted leave to do so. Father then filed a Petition for Modification seeking, in part, to modify child support to comport with the modified custody arrangement. The case proceeded to trial. After the conclusion of proof, the Trial Court sent a letter by facsimile to Rebecca Hunter in the Hamilton County Human Resources office stating, in pertinent part:

> The above styled, post-divorce case was tried on the issues of child support and related matters on December 19, 2008. Initially, I was told that a representative from the HR office would be here to detail Mr. Thompson's income, etc. We took our morning break and then I was told that the HR witness was cancelled because Mr. Thompson introduced one pay stub from October, 2008. I noticed your name was on the subpoena and therefore am writing to you. Please accept my apologies for any inconvenience caused to you.
>
> In order for me to complete my decision, we need some detailed information for 2007 on Mr. Thompson. We need to know the amount of his money that was spent by Mr. Thompson for his 2 children for health/medical insurance and dental insurance. I may need that same type information if Mr. Thompson's two children were covered by AFLAC if my understanding that AFLAC covers unpaid medical or dental bills for the children. I do not think disability payments would qualify as a deduction for child support purposes.

The Trial Court faxed a copy of this letter to the attorneys representing both parties and also attached a copy to its order entered December 31, 2008.

In its December 31, 2008 order, the Trial Court found and held, *inter alia*:

> [Mother] issued a subpoena duces tecum for Rebecca Hunter, a Human Resources employee of Hamilton County. After a break, the court learned that Ms. Hunter had been released from her subpoena and returned to work.

[Father's] 2007 federal income tax return included two attachments. First, his W-2 showed his wages to be $51,239.90. Second, attached to the return was a document entitled Summary of Annual Compensation for year 2007. [Father's] wages was [sic] listed as $49,939.85 for 2007. Perhaps this document, which also included the total monies paid by Hamilton County, including taxes, retirement and insurance, affected [Mother's] arguments about [Father's] gross income. Third, in an effort to determine [Father's] payment of insurance for the children, as opposed to the County's payment, the court faxed Rebecca Hunter on December 24, 2008 about such information. Ms. Hunter responded by submitting the materials for 2006, 2007 and 2008, she had prepared pursuant to [Mother's] subpoena duces tecum. According to that information, [Father's] compensation for 2007 was $52,762.01. The court selected the highest figure, $52,762.01, which figure benefitted [Mother], not [Father].

* * *

Based upon the foregoing, it is hereby **ORDERED**:

1. That [Father] shall have judgment against [Mother] for $6,275.13 due to his overpayment of child support to her and he is entitled to 12% per annum interest on this principal amount;

* * *

6. That the court's fax to Ms. Hunter, her reply, and the court's fax to counsel are attached hereto as Collective Exhibit "A";….

Mother appeals the Trial Court's December 31, 2008 judgment to this Court.

Discussion

Mother raises five issues on appeal, which we quote:

WHETHER THE TRIAL COURT ERRED WHEN IT *SUA SPONTE* CONDUCTED AN OUT OF COURT INVESTIGATION, GATHERED INFORMATION FROM A THIRD PARTY THAT DID NOT TESTIFY AT TRIAL AND CALCULATED CHILD SUPPORT BASED ON EVIDENCE OBTAINED THROUGH THAT INVESTIGATION?

WHETHER THE TRIAL COURT ERRED WHEN IT SET CURRENT SUPPORT USING INCOME FIGURES FOR 2007, DESPITE PROOF THAT FATHER OBTAINED A PAY INCREASE IN JULY 2007 AND JULY 2008 AND MOTHER RECEIVED INVOLUNTARY REDUCTIONS IN PAY?

WHETHER THE TRIAL COURT ERRED WHEN IT SET CURRENT SUPPORT FOR FATHER BASED ON AN ANNUAL INCOME OF $52,762.01 WHEN FATHER TESTIFIED HE OWNED A LAWN CARE BUSINESS, PROVIDED NO DOCUMENTATION FOR INCOME FROM THAT BUSINESS AND THE PROOF AT TRIAL SHOWED THAT FATHER HAD A MONTHLY INCOME OF $9,264.78?

WHETHER THE TRIAL COURT ERRED WHEN IT APPLIED A CREDIT TO FATHER FOR THE PAYMENT OF INSURANCE WHEN NO PROOF WAS OFFERED THAT THE AMOUNT COVERED ONLY THE CHILDREN?

WHETHER THE TRIAL COURT ERRONEOUSLY DISMISSED MOTHER'S PENDING CLAIMS FOR REIMBURSEMENT OF UNPAID MEDICAL EXPENSES AND REMAINING FINANCIAL ISSUES WHEN THE REIMBURSEMENT ISSUES WERE NOT CURRENTLY BEFORE THE COURT AS NEITHER PARTY PRESENTED THOSE ISSUES TO THE COURT IN A MOTION TO SET, AS REQUIRED BY THE COURT'S PREVIOUS ORDER?

Father requests on appeal that we disqualify Mother's attorney from representing her in this case in the future.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

We find Mother's first issue regarding the *sua sponte* investigation to be the dispositive issue in this appeal. As pertinent to this issue, Tenn. R. Evid. 614 provides:

> **Rule 614. Calling and interrogation of witness by court. –** (a) Calling by court. – The court may not call witnesses except in extraordinary circumstances or except as provided for court-appointed experts in Rule 706, and all parties are entitled to cross-examine witnesses thus called.

Tenn. R. Evid. 614(a). With regard to Tenn. R. Evid. 614(a), this Court has stated:

> That rule would also apply to the production of documentary evidence. Documentary evidence is only properly admissible after a witness lays a foundation. As one commentator on Tennessee law has stated:
>
> > Under the Anglo American trial process, lawyers for the parties have the responsibility of deciding which witnesses to call and what

> questions to ask. The judge is a neutral participant who generally refrains from direct involvement in the presentation of proof, other than to rule on objections by counsel.

Cohen, Sheppeard and Paine, *Tennessee Law of Evidence* § 6.14.1 (4th ed. 2000).

Lien v. Metro. Gov't of Nashville and Davidson Cty., 117 S.W.3d 753,763 (Tenn. Ct. App. 2003).

In the case now before us, the Trial Court obtained documentary evidence from Ms. Hunter that was used by the Trial Court in calculating child support. No extraordinary circumstances were shown which would have allowed for such a *sua sponte* investigation. Although Mother had issued a subpoena to Ms. Hunter, Mother had chosen not to call Ms. Hunter as a witness at trial. No foundation was laid to allow the introduction of the evidence that Ms. Hunter provided to the Trial Court post-trial. Neither party was given the opportunity to question or cross-examine Ms. Hunter with regard to this evidence. Father's only response to Mother's argument as to this issue on appeal is that he "has no issue with the court acquiring information from Mrs. Hunter."

Given all this, we find that the *sua sponte* investigation was undertaken in error even though done with the best of intentions. Because the Trial Court utilized the evidence obtained from Ms. Hunter in calculating child support, we vacate the Trial Court's December 31, 2008 order. We remand this case to the Trial Court to receive additional proof, or not, as the Trial Court deems necessary, and then to make new calculations and resolve all issues before it based upon the most current information and evidence as presented by the parties to, and received by, the Trial Court.

As for Father's request that we disqualify Mother's attorney from representing her in the future, that issue is not properly before this Court, and we will not address that issue here.

Conclusion

The judgment of the Trial Court is vacated, and this cause is remanded to the Trial Court for further proceedings consistent with this Opinion and for collection of the costs below. The costs on appeal are assessed against the Appellee, David Alan Thompson, Sr.

D. MICHAEL SWINEY, JUDGE